

The Unconstitutionality of Real ID Legislation and Its Effects on Undocumented Immigrants in the U.S. — Columbia Undergraduate Law Review

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On September 11, 2001, the United States experienced the deadliest terrorr attack in its history. In turn, the events of 9/11 have had a lasting legacy on American immigration policies, leading to the creation of the Department of Homeland Security (DHS), which is in charge of Customs and Border Protection, United States Citizenship and Immigration Services, and Immigration and Customs Enforcement (ICE). [1] Moreover, in 2005, Real ID legislation was introduced at the federal level as a post-9/11 policy to aid in combating future terrorist attacks. This legislation was passed as a way to standardize drivers' licenses throughout the U.S. by setting minimum guidelines individual states would need to follow to grant identification and driving permits, including requiring the verification of legal status for every applicant. [2]

Under the Real ID Act, Department of Motor Vehicles (DMV) agents are obliged to make difficult decisions concerning a person's legal status in the United States, essentially making state license-issuing organizations responsible for implementing federal immigration law. [3] Immigrants who do not have legal status or

who cannot prove it are discouraged from applying for these "non-compliant" licenses. [4] Since issuing licenses falls under state jurisdiction, the legislation has been expensive and slow to implement; nonetheless, coupled with increased partnerships between ICE and local law enforcement agencies, Real ID poses a major threat to people living in the United States without legal status. Every time they drive, unlicensed and undocumented drivers risk being deported. Real ID legislation violates the Tenth Amendment by infringing on the jurisdiction of individual states, and in doing so, has lasting, negative effects on undocumented immigrants in the United States because it compels states to apply verification of legal status.

Real ID legislation violates the Tenth Amendment, which ensures that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." [5] Real ID includes a variety of measures relating to enhanced security for driver's licenses and personal identification cards on a federal level, as well as directions for states that do not comply with the act's provisions. [6] While Real ID does not directly impose federal standards on states' issuance of driver's licenses and personal identification cards, it essentially compels states to adopt its standards. States must amend any conflicting state laws or regulations to adhere to Real ID standards in order for their licenses and identification cards to be recognized by federal agencies for official purposes, such as gaining access to federal facilities, boarding federally regulated commercial airplanes, and any other purposes determined by the Secretary of Homeland Security.

Moreover, the Real ID Act establishes the DMV as a legitimate immigration enforcement agency, once more blurring the lines between state and federal power. State DMV personnel will have to make difficult decisions about a person's legal status in the United

States, setting a harmful precedent for state government, since immigration control has historically been a federal obligation. [7] In *Gibbons v. Ogden* (1824), the Supreme Court determined that conducting interstate commerce was a power reserved to and exercised by Congress under the Commerce Clause. Although Congress has extensive authority to regulate state matters which affect interstate commerce, as demonstrated in *Gibbons*, this power is not unlimited and has been curtailed in recent years by the Supreme Court's interpretation of the Tenth Amendment. [8] In the United States, the states, not the federal government, grant driver's licenses. States also provide non-drivers with optional identification cards that do not confer driving privileges. Before the Real ID Act, each state had its own set of criteria for issuing a driver's license or identity card, which did not preclude interstate commerce from continuing unimpeded. Consequently, Real ID cannot be justified on the basis of Congress's jurisdiction to regulate interstate commerce, implying that it is a breach of the Tenth Amendment's protection of states' rights.

This is all the more evident in considering the case *New York v. United States* (1992), which builds on the precedent set forth in *Gibbons* to delineate where the Commerce Clause cannot justify federal intervention. In *New York*, the state of New York sued the federal government, contesting Congress' power to control state trash management under the Low-Level Radioactive Material Management Act Amendments of 1985. [9] The Supreme Court found that the "take title" provision of the Act—stipulating that states must regulate in accordance with congressional directives or take waste ownership—"compelled [states] to enact and enforce a federal regulatory program," commandeering the state lawmaking process in violation of the Tenth Amendment. The Court came to this judgment after concluding that power over state legislative processes was a central part of state sovereignty, undermined by the

imposition of a federal mandate. The Act's "take title" provision offered states a choice between two "unconstitutionally coercive alternatives": to regulate in accordance with congressional directives, or take liability of the waste themselves, the latter being practically infeasible. [10] In turn, it was deemed unconstitutional and incompatible with the Commerce Clause. The states' "option" was no option at all. [11]

The Real ID Act gives states a similar non-choice: states can either amend their processes to issue driver's licenses that comply with the national Real ID standard, or face sanctions that will restrict their residents' ability to travel or use other federal agencies. In line with the *New York* precedent, Real ID should be regarded as a province of the states. This legislation causes state licenses to turn into national ID cards by stipulating that state driver's licenses and IDs will not be accepted for "federal purposes"—including boarding an aircraft or entering a federal facility—unless they meet all of the Act's numerous conditions. Given that state governments issue driver's licenses, federal mandates to issue and verify the ID would unconstitutionally "commandeer" state governments to serve federal regulatory interests.

This is particularly concerning in light of Supreme Court precedent in *Printz v. United States* (1997), which extended the anti-commandeering principle to cover not just a state's legislative process, but also executive activities such as law enforcement. *Printz* challenged the 1993 Brady Handgun Violence Prevention Act, which compelled state and local officials to conduct federal background checks on potential handgun purchases. The Court declared the Brady Act unconstitutional, stating that "it is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority," which the Act infringed upon. [12] In the case of Real ID legislation, the federal government likewise cannot command the

states' executive powers by compelling them to execute federal laws regarding driver's license and ID criteria. Because the issuance of driver's licenses remains a function of state law, the minimum issuance and verification requirements established by the Real ID Act constitute an effective commandeering by Congress of a state process, in violation of the Tenth Amendment.

These issues take on a new gravity in light of the Real ID's impact on undocumented immigrants. Undocumented immigrants in the United States may be deterred from applying for a license or ID altogether because of the Real ID Act's legal status requirement; even if they obtain one, they will live in fear of revealing their documentation status to public safety officials. Non-compliant state ID cards, which undocumented immigrants might initially feel more comfortable receiving as they do not reveal information on lawful status, are marked to physically differentiate them from Real ID-compliant cards. [13] This can serve as an indirect indication of legal status, thus deterring them from obtaining and using an ID altogether out of fear of discrimination and deportation.

Ultimately, immigrants, asylum seekers, and people of color will face discrimination and scapegoating as a result of the Act through heightened racial profiling by municipal, state, and federal personnel. [14] Real ID legislation will inevitably result in long delays and increasing bureaucratic difficulties for all driver's license applicants, but especially disadvantage immigrant applicants given the intricacy of immigration regulations. Hundreds of thousands of immigrants might lose their driver's licenses due to mistakes made by DMV agents, who are not trained to navigate complicated immigration regulations while issuing licenses and IDs. [15] Additionally, the Real ID Act's legal status requirement in particular could impact how DMV workers treat undocumented immigrants when trying to adhere to the Act's requirements. Inquiring about citizenship status in the regulation of licenses and ID cards

inevitably poses a great danger to the safety and livelihood of undocumented immigrants.

Thus, Real ID legislation causes states to regulate immigration, which violates the federalism principles of the Tenth Amendment. Immigration issues that arise out of Real ID legislation are inextricably tied to the fact that states have to decide whether to issue these identification cards to undocumented residents. The federal government's "commandeering" of state governments to engage in immigration enforcement through Real ID legislation will disadvantage undocumented immigrants, who face their own non-choice: to apply for a Real ID, when they cannot meet the legal status criterion, or to fear risking deportation every time they drive or travel without a compliant ID. [16] In the absence of constitutional challenges to Real ID legislation, the federal government will continue to circumvent federalism concerns by compelling states to conform to Real ID standards without directly imposing federal obligations on states. Thus, Tenth Amendment challenges to the Real ID Act are necessary to bring the constitutionality of the Act before the Supreme Court and thereby confront the Act's infringement of state sovereignty and targeting of undocumented immigrants.

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Sources:

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[3] *Real ID*, American Civil Liberties Union, online at

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[5] U.S. Constitution, amend. 10.

[6] *REAL ID FAQs*, Department of Homeland Security.

[7] Shirley Lin, “States of Resistance: The Real ID Act and Constitutional Limits upon Federal Deputization of State Agencies in the Regulation of Non-Citizens,” 12 *CUNY Law Review* 2, 329 (2009).

[8] *Gibbons v. Ogden*, 22 U.S. 1 (1824).

[9] *New York v. United States*, 505 U.S. 144 (1992).

[10] *Id.*

[11] Human Rights Commission and Immigrant Rights Commission, “Real ID Act: A Federal Law’s Impact on the Human and Civil Rights of San Franciscans,” 18 (2006).

[12] *Printz v. United States*, 521 U.S. 898 (1997)

[13] *REAL ID FAQs*, Department of Homeland Security.

[14] Human Rights Commission, “Real ID Act,” 18.

[15] *Real ID & Immigrants’ Rights*, New York Civil Liberties Union (2007), online at <https://www.nyclu.org/en/real-id-immigrants-rights> (visited December 6, 2021).

[16] Lin, “States of Resistance,” 345.